In the Supreme Court of the United States

OCTOBER TERM, 1968

HENRY KENNETH WANGROW AND
MARK EDWARD MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

[illegible],
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Barfield v. *United States*, 229 F. 2d 936	7
Battaglia v. *United States*, 205 F. 2d 824	8
Blockburger v. *United States*, 284 U.S. 299	10
Bollenbach v. *United States*, 326 U.S. 607	9
Feinstein v. *United States*, 390 F. 2d 50	11
Gore v. *United States*, 357 U.S. 386	10
Heflin v. *United States*, 358 U.S. 415	9
Milanovich v. *United States*, 365 U.S. 551	9, 10
Morandy v. *United States*, 170 F. 2d 5, certiorari denied, 336 U.S. 938	8
Prince v. *United States*, 217 F. 2d 838	8
Travers v. *United States*, 335 F. 2d 698	8, 9
United States v. *Gainey*, 380 U.S. 63	8

Statutes:

18 U.S.C. 371	2
18 U.S.C. 641	2, 9
18 U.S.C. 1361	2
18 U.S.C. 2115	2, 9
18 U.S.C. 2312	2
Minn. Stat. Ann. § 609.59	11

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 421

HENRY KENNETH WANGROW AND
MARK EDWARD MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1968. The petition for a writ of certiorari was filed on August 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court properly charged that proof of possession of a recently stolen automobile which was transported interstate permits an inference of guilty knowledge and of interstate transportation; and that proof of possession of recently stolen government property permits an inference of guilty knowledge.

2. Whether petitioners could be separately convicted on one count charging the breaking and entering of a post office, and one charging the retention of stolen government property.

3. Whether petitioners' arrest was based upon probable cause.

STATEMENT

Petitioners were convicted in the United States District Court for the District of Minnesota on an indictment which charged breaking and entering a post office in violation of 18 U.S.C. 2115 (Count 1); destruction of government property in violation of 18 U.S.C. 1361 (Count 2); interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312 (Count 4); and a conspiracy to break and enter a post office in violation of 18 U.S.C. 2115, 371 (Count 5).[1] They were also convicted on an information charging the possession of stolen government property in violation of 18 U.S.C. 641. Both petitioners were sentenced to imprisonment for ten years on the information

[1] Another defendant, Daniel Czajkowski, was convicted on Count 4 charging another Dyer Act violation.

charge and Count 2 of the indictment, the terms to run concurrently. Consecutive to the ten years' sentence on the information charge, both petitioners were sentenced to imprisonment for five years on Count 4, with five-year sentences on Counts 2 and 5 to run concurrently with that imposed on Count 4. The court of appeals affirmed the convictions (Pet. App.).

The government's evidence showed that on August 15, 1966, a 1966 Oldsmobile was stolen from North Cicero Avenue in Chicago, Illinois (Tr. 94-98).[2] On August 4, a 1966 Pontiac was stolen from a parking lot in Rosemont, Illinois (Tr. 163-166). On October 3, 1966, Sergeant William Handardt of the Criminal Investigation Unit in Chicago received information that co-defendant Eugene Karzas was responsible for a burglary in Chicago which had occurred on the previous day (M. Tr. 104, 109-110). Karzas, known as a convicted felon and expert safecracker, was placed under surveillance by the Chicago police (M. Tr. 107-108, 110, 132, 133). On that evening, Karzas was observed leaving his home and entering a 1966 Pontiac bearing Illinois license plate number BT-6106. He travelled to Nash's Restaurant where he met with both petitioners and one Daniel Czajkowski for approximately one hour (Tr. 14-16). On the basis of this meeting, petitioners and Czajkowski, all of whom had felony records and reputations as major criminals, were also placed under surveillance (Tr. 36-37).

---

[2] References are to the transcript at trial (Tr.) and the transcript of the motion to suppress (M. Tr.). The latter is a transcription of hearings before the Fourth Judicial District of Minnesota, County of Hennepin, where the original motion to suppress was made. All parties agreed that the district court could base its determination on those proceedings (see 2R. 23-28).

Two days later, the four again met at another restaurant. Czajkowski arrived at the meeting in a 1966 Oldsmobile bearing Illinois license number SJ-8611. After the meeting, the 1966 Oldsmobile was driven away by petitioner Wangrow (Tr. 38-41). About one half-hour later, both petitioners were observed heading out of Chicago in the Oldsmobile (Tr. 42-44).

On October 6, Sergeant Handardt received information from an informant that Karzas was going to commit another post office burglary (M. Tr. 119, 140). In the meantime, a check on the registration showed that both the Pontiac and Oldsmobile were registered under fictitious names (M. Tr. 116-117). The following day, Karzas left his home in the Pontiac and, after picking up Czajkowski, drove to Eau Claire, Wisconsin. Surveillance was temporarily suspended in Eau Claire, but both the Pontiac and the Oldsmobile were located by the Chicago police on the next day at the Thunderbird Motel in Bloomington, Minnesota (Tr. 45-48, 75-77).

After the automobiles were located, the Chicago and Minneapolis police resumed surveillance. At approximately 1:00 p.m., petitioners drove away in the Oldsmobile, and returned one half hour later. At 3:00 p.m., all four drove away in the Oldsmobile (Tr. 23-26).

At 4:30 p.m., Detective Fred Holmes of the Minneapolis Police Department joined in the surveillance. He was told by the Chicago police officers that Karzas was an expert safecracker, and that petitioners and Czajkowski were convicted felons (M. Tr. 132-133, 216); that they had received information that

Karzas would commit a post office burglary in the near future (M. Tr. 146, 219); and that two of the four had registered at the Thunderbird Motel under assumed names (M. Tr. 216-217).

At approximately 7:00 p.m., a burglary was committed at the Eastern Heights Post Office in St. Paul, Minnesota. Two safes had been opened with an acetylene torch. Smears of orange paint were found on cement blocks near the door of the post office (Tr. 174-176, 180-185).

At 9:10 p.m., Detective Holmes, who had not learned of the burglary, observed the Oldsmobile return to the motel, and four men get out of the automobile (M. Tr. 269-270). Holmes then observed the men move an orange colored tank, which looked like an acetylene tank, from the Oldsmobile to the Pontiac. He also observed the movement of a case which he believed to contain burglary tools. He reported this information to the Chicago police, and added that the men were hurrying and looking around as if they were afraid that someone would see what they were doing (M. Tr. 225, 270-273; Tr. 102-103). On the basis of this information, the Chicago and Minneapolis police decided to arrest the occupants of the motel room. They knocked on the door of the room, and stated that they were employees of the motel. When the door was opened, petitioners and the others were placed under arrest for possession of burglary tools and for possession of stolen government property. The arresting officers noticed a quantity of stamps and money in the room (M. Tr. 229-232, 286-289).

Other evidence showed that insulation from the safes was found on burglary tools located in the automobile, and on a white pullover shirt taken from petitioners (Tr. 290-293), and that the shirt and a pry bar were covered with red paint similar to that found on a vending machine which had been broken open in the post office (Tr. 293, 295).

ARGUMENT

1. With respect to the Dyer Act charge in Count 3 (dealing with the 1966 Oldsmobile), the trial court charged that recent possession of the automobile, if not satisfactorily explained, was:

> * * * ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce. [Tr. 396.]

and that:

> * * * if you should find beyond a reasonable doubt from the evidence in the case that the automobile * * * was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in possession of the accused in another State than that in which it was stolen, the jury would ordinarily be justified in drawing from those facts the inference that the automobile was transported, or caused to be transported in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently stolen property by the

> accused in such other State is explained to the satisfaction of the jury by other facts and circumstances in the case. [Tr. 397-398.]

Petitioners objected to the charge on the ground that it tended to shift the burden of proof (Tr. 408-409).

With respect to the offense of retaining stolen government property in violation of 18 U.S.C. 641, the court charged that possession of recently stolen property, unless satisfactorily explained, was:

> * * * ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also participated in some way in the theft of the property. [Tr. 396-397.]

No exception was taken to this charge.

Petitioners now challenge the validity of the instructions on several alternative theories. They first contend that the instructions are similar to those disapproved in *Barfield* v. *United States*, 229 F. 2d 936 (C.A. 5). In that case, however, the trial court charged that proof of recent possession raised a "presumption" of guilty knowledge. The court of appeals held that the instruction, in context, had the improper effect of telling the jury that they *must* convict absent a satisfactory explanation. Here, however, the court took great pains to point out not only that proof of recent possession was a circumstance which would justify drawing an inference of guilty knowledge but also that the jury could reject the inference based on the circumstances of the case.

Petitioners further contend that the instructions amounted to an improper comment on their failure to testify in their own behalf. The trial court, however, noted that the "satisfactory explanation" could be found from the facts and circumstances of the case, and never intimated that it was incumbent upon petitioners to testify in their own behalf (Tr. 398). Cf. *United States* v. *Gainey*, 380 U.S. 63, 71, n. 7. Moreover, the trial court specifically instructed that no inference was to be drawn from petitioners' failure to testify in their own behalf (Tr. 404-405).

Petitioners' third challenge to the validity of the instructions—that the inferences are unreasonable—is without substance. The evidence—independent of the inference—showed that the 1966 Oldsmobile was registered under a fictitious name, and that both petitioners drove it from Chicago to Bloomington, Minnesota. In these circumstances, the jury was entitled to draw the inference that petitioners were aware that the vehicle was stolen, and that they caused its transportation in interstate commerce. *Travers* v. *United States*, 335 F. 2d 698 (C.A.D.C.); *Prince* v. *United States*, 217 F. 2d 838 (C.A. 6); *Battaglia* v. *United States*, 205 F. 2d 824 (C.A. 4); *Morandy* v. *United States*, 170 F. 2d 5 (C.A. 9), certiorari denied, 336 U.S. 938. With respect to the charge of retaining stolen government property, the independent evidence showed that petitioners were at the scene of the crime from which the property (money and stamps) was taken, and that the property was found in their possession less than three hours after the theft. Here,

too, the inference of guilty knowledge was reasonable.[3]

Finally, petitioners contend that, with respect to the Dyer Act charge, the instructions were improperly given because possession was not "recent." Although petitioners' possession of the automobile was shown to have been some fifty-one days after the theft, the question of whether or not their possession was "recent" was one for the jury. *Travers* v. *United States*, 335 F. 2d 698, 702 (C.A.D.C.). Moreover, the trial court was careful to point out that the longer the period of time between theft and possession, the weaker the inference of guilty knowledge (Tr. 397).

2. Relying upon *Heflin* v. *United States*, 358 U.S. 415, and *Milanovich* v. *United States*, 365 U.S. 551, petitioners contend that the government was improperly permitted to "pyramid penalties" by reason of the fact that they were charged and convicted on one count charging breaking and entering a post office (18 U.S.C. 2115), and another count charging the retention of stolen government property (18 U.S.C. 641) which was the fruit of their breaking and entering. But the sentence imposed on the former count was equal to, and was ordered to run concurrently with, that imposed on the latter. Moreover, *Heflin* and *Milanovich* are inapposite to the facts present here. In *Heflin*, the legislative history indicated that Con-

[3] The present case is quite unlike *Bollenbach* v. *United States*, 326 U.S. 607, in which the Court held that the charge, in those circumstances, improperly advised the jury that it was at liberty to find the defendant guilty of *conspiring* to transport stolen property in interstate commerce from the proof of his possession. See 326 U.S. at 613.

gress did not intend—in adding a new subsection to 18 U.S.C. 2113 making it a crime to receive and possess the fruits of a bank robbery—that the bank robber should receive an increased punishment if he were the receiver or possessor. In *Milanovich*, the Court relied on a similar legislative background. But no such problem arises here. Although all occurred in the same series of transactions, the crime of breaking and entering involves actions and impulses clearly different from those of retaining stolen government property. The convictions were therefore proper. Cf. *Gore* v. *United States*, 357 U.S. 386; *Blockburger* v. *United States*, 284 U.S. 299.

3. Petitioners contend that their arrest was not based upon probable cause, and thus that the searches effected thereafter (including two made under otherwise valid search warrants) were illegal. The contention is without substance.

As set forth in the Statement above, the Chicago police had received information from an informant (whose reliability was undetermined at trial) that Karzas had committed an unsolved post office burglary in Chicago, and that he was going to commit another in the near future. The Chicago police knew that he was an expert safecracker. They had observed his meetings with other known felons (including petitioners), and knew that they had driven to Bloomington in vehicles which had been registered under fictitious names. They had further learned that two of the four had registered at the Thunderbird Motel under assumed names. All of this information had been related to officials of the Minneapolis Police Department on the afternoon prior to the arrest. When the four

returned to the motel in the evening, they were observed moving—in a suspicious manner—an acetylene tank and a case which appeared, to a surveilling officer, to contain burglary tools.[4] In these circumstances, as the court below noted, petitioners' contention that the police officers "did not have probable cause to make the arrest [for possession of burglary tools][5] borders on the frivolous." *Feinstein* v. *United States*, 390 F. 2d 50, 53 (C.A. 8). The search made contemporaneously with that arrest, and those made under validly executed search warrants, were therefore proper.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

SEPTEMBER 1968.

---

[4] Although, as petitioner suggests (Pet. 10), Detective Holmes, who observed the four return to the motel, could not identify them because of the darkness, that fact is irrelevant. He was told that they would return in a 1966 Oldsmobile, and he in fact recognized that car.

[5] Possession of burglary tools is a crime under Minnesota law. Minn. Stat. Ann. § 609.59.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 319650 188